No. 18-485

In the Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the statute of limitations for a § 1983 due process claim based on the alleged use of fabricated evidence to effect a deprivation of liberty begins to run when (1) the defendant discovers that fabricated evidence has been used to effect the deprivation, or (2) later, when criminal proceedings (if any) are terminated in the defendant's favor.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Amici are nonprofit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services. *Amici* monitor and analyze legal developments that impact local governments and advocate for greater protection of government officials as they serve the public.

Amici's member governments, law enforcement agencies, and public attorneys serve on the front lines of the daily battles over government searches and seizures and the § 1983 claims brought to challenge them. As such, *amici* have a strong institutional interest in two issues presented here.

First, as representatives of the public entities and officials against whom § 1983 claims are brought, *amici* have a substantial interest in ensuring that the scope of § 1983 liability is limited to particular violations of "the Constitution and laws," as Congress intended, and does not (as Petitioner would have it) encompass ordinary common-law tort claims. 42 U.S.C. § 1983.

Second, *amici* have a particularized interest in the rules for determining accrual of those constitutional claims. Specifically, *amici* advocate for an accrual rule that both allows for the orderly administration of

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* All parties have consented to the filing of this brief. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

justice and faithfully reflects the "values and purposes" of the constitutional right at issue. By arguing for a freestanding "fabrication of evidence" § 1983 claim (which he attempts to contort into an equally freestanding "malicious prosecution" claim) that may accrue years after any cognizable injury, McDonough advocates for a § 1983 regime that is divorced from its constitutional roots; is inconsistent with the values embodied in the due process right actually at issue here; and would impose severe practical and administrative burdens on the state and local organizations and officials who must defend § 1983 claims.

Remarkably, McDonough invokes the needs of "local officials" in support of his proposed delayed-accrual rule. As organizations representing the interests of many of those officials, *amici* emphatically reject McDonough's attempt to co-opt their members in the service of an accrual rule that would vitiate the protections of the statute of limitations, impair their ability to defend § 1983 claims, and impose upon them indefinite and unmanageable administrative burdens.

For these reasons, *amici* urge that the Court affirm the Second Circuit's determination that the only claim presented here—a due process claim—accrued (if it was viable at all) no later than the date on which he became aware that the allegedly fabricated evidence was used to deprive him of a protected liberty interest.

* * *

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 State municipal leagues, the

NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

McDonough's § 1983 "fabrication of evidence" claim avoids what this Court has repeatedly emphasized is the "threshold inquiry" in assessing a § 1983 claim: "identify[ing] the specific constitutional right at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). There is no freestanding § 1983 cause of action for "fabrication of evidence" or "malicious prosecution" divorced from an alleged violation of a particular constitutional right. By attempting to frame his claim in terms of state common law torts, without regard to any specific constitutional violation, McDonough seeks to improperly expand the scope of § 1983 to encompass general tort grievances against state and local officials, contrary to both the statutory text and this Court's jurisprudence.

The only arguably cognizable § 1983 claim presented here is the one the Second Circuit resolved—a due process claim. To the extent there is a viable due

process claim at issue, it is the only claim this Court can or should address.

The Second Circuit correctly applied the "standard" accrual rule to McDonough's due process fabrication of evidence claim, holding that his claim accrued when he learned that fabricated evidence had been used to deprive him of liberty. There is no basis for applying the "refinements" to the standard rule embodied in this Court's decisions in *Wallace v. Kato*, 549 U.S. 384 (2007), and *Heck v. Humphrey*, 512 U.S. 477 (1994). Neither decision involved a due process fabrication of evidence claim, and both involved material circumstances not present here.

The delayed-accrual rules proposed by McDonough are not consistent with the asserted due process right, and would constitute bad public policy. The indefinite delay in accrual that would result from McDonough's proposed "favorable termination" and "continuing tort" accrual rules would reduce legal certainty, make legitimate § 1983 claims more difficult to prove and to defend, and impose undue administrative costs on the state and local entities and officials who bear the burden of defending such claims.

ARGUMENT

I. Determining the accrual date for McDonough's claim requires first identifying the particular constitutional right allegedly violated—here, the right to due process.

A. There is no freestanding § 1983 claim for "fabrication of evidence" or "malicious prosecution."

This Court has consistently emphasized that § 1983 does not create a generalized tort action

against government officials. *See, e.g., Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (Section 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more."). Both the statutory text and principles of sovereign immunity require that any action brought under § 1983 be rooted in a particular constitutional or statutory right. *See* 42 U.S.C. § 1983 (creating cause of action for a deprivation of rights "secured by the Constitution and laws"). Consistent with that requirement, the "threshold inquiry" in any § 1983 suit is to "'identify the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)).

Petitioner willfully avoids this "threshold inquiry." He characterizes his § 1983 claim as a "fabrication of evidence" claim, which he then argues should be treated for accrual purposes as a "malicious prosecution" claim. Br. of Pet'r 23. But there is no such thing as a "fabrication of evidence" or "malicious prosecution" claim under § 1983. *See, e.g., Rehberg*, 566 U.S. at 366. There is only a claim that by fabricating evidence or prosecuting the complainant, an official has violated a specific federal constitutional or statutory right.

There is a role in § 1983 actions for analogizing to common-law torts to determine the elements of the constitutional claim. But Petitioner's approach would effectively *substitute* the analogous tort for the constitutional claim, in derogation of both the statutory text and this Court's jurisprudence. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 271–72 ("[Section] 1983 provides a uniquely federal remedy . . . [that] can have

no precise counterpart in state law.") (citations omitted) (internal quotation marks omitted); *id.* at 272 ("[I]t is 'the purest coincidence' when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.") (quoting *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)). As a number of courts and commentators have pointed out, this practice of substituting common-law torts for constitutional torts is not only inconsistent with the statutory text and governing precedent, but also "invites confusion" and obscures the required constitutional analysis. *Castellano v. Fragozo*, 352 F.3d 939, 954 (5th Cir. 2003) (en banc); *see also, e.g., Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("[I]f a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion gained by calling the legal theory 'malicious prosecution.'") (quoting *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2009)). McDonough's attempt to characterize his claim as an extra-constitutional "fabrication of evidence" claim and then to re-characterize that claim as an equally extra-constitutional (and immunity-barred) "malicious prosecution" claim is another example of the confusion that results from divorcing § 1983 from its constitutional foundations. *See Castellano*, 352 F.3d at 954; *Parish*, 594 F.3d at 554.

Any right of recovery arising from official conduct necessarily arises from the particular right asserted. By arguing that it *does not matter* which specific constitutional violation is alleged, *see* Br. of Pet'r 3, 19, 42, McDonough seeks to transform § 1983 into a vehicle for generalized tort grievances against the gov-

ernment—exactly what both Congress and this Court have said it is not.

B. The Second Circuit properly considered and resolved McDonough's claim as a due process claim.

Although Petitioner persistently declines to specify which constitutional right underlies his "fabrication of evidence" claim, the Second Circuit unambiguously characterized it as a claim of "denial of due process based on fabricated evidence." *McDonough v. Smith*, 898 F.3d 259, 260 (2d Cir. 2018). That characterization was drawn directly from Petitioner's own briefs, which expressly distinguished his "due process fabrication of evidence" claim from his "malicious prosecution" claim. Br. of Pl.-Appellant 1, 2–3, *McDonough v. Smith*, No. 17-296 (2d Cir. 2017); *see also id.* at 5 (distinguishing "due process fabrication of evidence" claim in Count I from "malicious prosecution" claim in Count II).

Contrary to Petitioner's repeated suggestions, Br. of Pet'r 5, 41–43, there is no Fourth Amendment accrual issue before the Court. McDonough's Fourth Amendment "malicious prosecution" claim was found barred by absolute immunity and is not presented here. (Indeed, McDonough's Fourth Amendment claim is still being actively litigated in the district court against non-immune defendants.) To the extent this Court wishes to address accrual in the post-process, pre-trial Fourth Amendment context, it should grant the pending petition for certiorari in *Manuel v. City of Joliet*, 137 S. Ct. 911 (7th Cir. 2017), *petition for cert. filed*, No 18-1093 (U.S. Feb. 21, 2019).

It was thus specifically in the context of due process that the Second Circuit determined that the "standard" rule of accrual applied to the claim at issue here. In fact, the Second Circuit identified the circuit split on the accrual question as relating specifically to the "due process fabrication cause of action." *McDonough*, 898 F.3d at 267. That is the only split the Court should use this case to resolve.

II. Both precedent and policy considerations confirm that McDonough's § 1983 due process claim accrued when he learned that fabricated evidence was used to deprive him of liberty.

A. A § 1983 claim accrues when the plaintiff has a complete and present cause of action, subject to exceptions not present here.

In *Wallace*, this Court explained that § 1983 claims are generally governed by the "standard" common-law accrual rule, under which a claim accrues "when the plaintiff has a complete and present cause of action." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That is, the claim accrues when "the plaintiff can file suit and obtain relief." *Id.* (quoting *Bay Area Laundry*, 522 U.S. at 201).

Under the standard rule, determining the accrual of McDonough's due process claim is straightforward. As the Second Circuit explained, "a fabrication of evidence claim accrues when (1) "a plaintiff learns of the fabrication and it is used against him," and (2) "his liberty has been deprived in some way." *McDonough*, 898 F.3d at 266. There is "no dispute" that

"McDonough suffered a liberty deprivation because of that [fabricated] evidence when he was arrested and stood trial," and there is no doubt that McDonough learned of this fact no earlier than the date of his arrest and no later than "the end of his first trial." *Id.* at 267. Because both those dates occurred more than three years before McDonough filed his § 1983 action, the Second Circuit correctly determined that his due process claim was time-barred.

There can be exceptions to the standard accrual rule where strong countervailing considerations exist. The Court has identified two such exceptions. In *Wallace*, the Court acknowledged the need for a "refinement" of the standard rule for pre-process Fourth Amendment false-arrest claims based upon "the common law's distinctive treatment of the torts of false arrest and false imprisonment," under which accrual of those claims is delayed until "the alleged false imprisonment ends" upon the initiation of process. *Wallace*, 549 U.S. at 389 (quoting 2 H. Wood, Limitation of Actions § 187d(4), p. 878 (rev. 4th ed.1916)). The rationale for that refinement of the standard rule is the practical "reality that the victim may not be able to sue while he is still imprisoned." *Id.*

Similarly, in *Heck*, 512 U.S. at 489, the Court modified the standard accrual rule for § 1983 claims for damages attributable to an unconstitutional conviction or sentence, holding that such claims do not accrue until the conviction or sentence has been invalidated. In crafting this "*Heck* bar" to claim accrual, the Court explained that it was compelled by the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. As this

Court subsequently clarified, the *Heck* bar applies only "when there exists a conviction or sentence that has *not* been . . . invalidated"; applying the *Heck* bar to "an action which would impugn an *anticipated future conviction*" would constitute a "bizarre" extension of the doctrine. *Wallace*, 549 U.S. at 393.

McDonough's claims are readily distinguishable from those presented in *Wallace* and *Heck*. *Wallace* involved a pre-process Fourth Amendment false-imprisonment claim; McDonough's claim arises under the Due Process Clause and does not implicate the scenario in which "the victim may not be able to sue while he is still imprisoned."[1] *Wallace*, 549 U.S. at 389. The constitutional provision invoked in *Heck* is not entirely clear, but it is undisputed that McDonough, unlike the plaintiff in *Heck*, is not the subject of any "outstanding criminal judgment" that would bar his claim. *Heck*, 512 U.S. at 487. Without a conviction or sentence, the concerns justifying the bar do not exist and it does not apply.

The standard accrual rule thus governs McDonough's claim, unless for some reason a different rule would better serve the "values and purposes" of the Due Process Clause. *Manuel*, 137 S. Ct. at 921. We address that question below.

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[1] To the extent McDonough argues that he was effectively "imprisoned" by the terms of his post-indictment release, such that he was barred from filing a § 1983 suit prior to acquittal, that argument was never presented to either the district court or the Court of Appeals. Accordingly, it is waived.

B. The delayed-accrual rules proposed by McDonough do not comport with the values and purposes of due process and are bad public policy.

Both doctrinal and practical considerations support the Second Circuit's application of the standard accrual rule to McDonough's due process claim.

1. McDonough's proposed accrual rules do not comport with the "values and purposes" of the asserted due process right.

Although common-law tort principles may provide a "guide" in determining the "contours and prerequisites" of a § 1983 claim, "including its rule of accrual," the common law does not subsume underlying constitutional principles. *Manuel*, 137 S. Ct. at 920. Rather, "in applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue"—here, the right not to be deprived of liberty without due process. *Id.* at 921.

The delayed-accrual rules proposed by McDonough are not consistent with established due process doctrine. As a threshold matter, linking claim accrual temporally to the challenged deprivation—as the standard rule does—allows abuses to be promptly brought to light and corrected, consistent with the Due Process Clause's overarching concern with ensuring "fair administration of justice." *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). More important, the standard accrual rule comports with existing due process doctrine, under which an unlawful deprivation of liberty is actionable *even if the victim is never prosecuted*. *See, e.g., Zinermon v.*

Burch, 494 U.S. 113 (1990) (finding that non-prosecuted mental health patient sufficiently stated § 1983 claim for deprivation of liberty without due process). By allowing plaintiffs to sue immediately upon the unlawful deprivation, the standard rule gives direct and immediate effect to the due process right.

By contrast, the proposed "favorable termination" accrual rule is inconsistent with established due process principles. Because a due process fabrication of evidence claim is cognizable whether the victim is prosecuted or not, there is "no good reason why the accrual of a claim," like McDonough's, "should have to await a favorable termination of the prosecution." *Manuel I*, 137 S. Ct. at 926 (Alito, J., dissenting). Indeed, in this context a favorable termination accrual rule "makes no sense." *Id.* at 925 (Alito, J., dissenting).

2. McDonough's proposed accrual rules would needlessly burden local officials and deprive them of the protection of the statute of limitations.

Petitioner repeatedly invokes the "unnecessary burdens" and "uncertainty" that an early accrual rule would purportedly impose on defendants, arguing that the standard accrual rule "is of no service to public officials." Br. of Pet'r 5, 18, 53. *Amici*, as the organizations representing the interests of those public officials, strongly reject Petitioner's attempt to co-opt their members in support of a delayed accrual regime that would be inimical not only to their interests, but to the public's interest in the sound and predictable administration of justice.

Contrary to Petitioner's suggestions, the interests of local governments and officials—and of the public they represent—are best served by the standard accrual rule. By maintaining a close temporal nexus between the asserted constitutional injury and claim accrual, the standard rule serves "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). By contrast, Petitioner's preferred rule would undermine those policies by permitting the indefinite deferral of § 1983 claims through one or more trials, appeals, and collateral attacks on conviction. A prosecutor or other government official might be forced to wait many years—conceivably even decades—before learning that she has been accused of unconstitutional conduct. To the extent Petitioner is concerned about officials' ability "to calculate with certainty when their Section 1983 liability draws to a close," Br. of Pet'r 52, he should favor the standard rule—not a favorable termination rule that may result in indefinite claim deferral.

A delayed-accrual regime also results in intractable problems of proof that impede the administration of justice. The longer the temporal gap between the allegedly unconstitutional action and the plaintiff's § 1983 claim, the more difficult it becomes to both assert and defend the claim. As this Court explained in *Wilson v. Garcia*, "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." 471 U.S. 261, 271 (1985). And as a practical matter, adoption of a favorable-termination accrual regime would impose on local governments an obligation to

retain indefinitely evidence and records of an almost infinite array of events—an unnecessary and impracticable administrative burden on governments and agencies that already face severe resource constraints.

As this Court has recognized, "[s]tates and municipalities have a strong interest in timely notice of alleged misconduct by their agents." *Wallace*, 549 U.S. at 397 (quoting Br. for State of Illinois et al. as *Amici Curiae* 18). Petitioner's suggestion that local governments and officials would "prefer the possibility of a later § 1983 suit to the more likely reality of an immediate filing . . . is both implausible and contradicted by those who know best"—the municipal organizations that *amici* represent. *Wallace*, 549 U.S. at 397.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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